IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 28TH SEPTEMBER 2007 / 6TH ASWINA 1929

CRL.A.No. 559 of 2000(C)

SC.1/1997 ON THE FILE OF THE COURT OF THE SESSIONS JUDGE, THRISSUR.

APPELLANT: ACCUSED:

SHELLY, S/O. POYYARAYIL KARUNAKARAN,
VATANAPPILLY DESOM, VATANAPPILLY VILLAGE.

BY ADV. SRI.B.RAMAN PILLAI
SMT.P.MAYA
SRI.K.V.RAMABHADRAN
SRI.P.VIJAYA BHANU
SRI.R.ANIL

RESPONDENT: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM,
REPRESENTING THE C.I. OF POLICE, CHELAKKARA.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 20/06/2007, THE COURT ON 28-9-2007 DELIVERED THE FOLLOWING:

Crl.M.A.No. 4012 /2000 in Crl.A.No. 559/2000

Dismissed.

28-9- 2007

Sd/-K. Thankappan,
Judge.

mn.

K.Thankappan,J.

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Crl.L.P.No. /2006

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Judgment

-12-2006

K. Thankappan, J.

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Crl. A. No. 559 of 2000

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Dated this the 28th day of September, 2007

JUDGMENT

First accused in S.C. No. 1/1997 on the file of the Court of the Sessions Judge, Thrissur is the appellant. Appellant along with accused Nos.2 and 3 faced trial for offences punishable under sections 307 read with section 34 IPC, section 57-A of the Abkari Act and section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The appellant is alleged to be the contractor of T.S.No.180 at Kondazhi and T.S.No.169 at Vadakkethara and accused Nos.2 and 3 are said to be the salesmen in the said toddy shops respectively. The charge against the appellant and accused 2 and 3 is that they sold toddy containing poisonous substance to PWs.1, 3 to 23 on 17-4-1996 with the knowledge that toddy adulterated with such poisonous substance would cause death of the persons and thereby committed the offences charged against them. On the side of the prosecution PWs.1 to 36 were examined and Exts.P1 to P57 and Mos. 1 to 6 were marked. After closing the evidence on the side of the prosecution, the appellant and other accused were questioned under section 313 of Cr.P.C. They denied the allegation and stated that they were falsely

implicated in the above case and they had not sold adulterated toddy as alleged by the prosecution. On the side of the defence, DW1 was examined. After considering the entire evidence, the trial court found the appellant guilty of the offence punishable under section 57-A(3) of the Abkari Act and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.25,000/- and in default to undergo rigorous imprisonment for one year. Accused 2 and 3 were acquitted of all the charges levelled against them giving them benefit of doubt. The benefit under section 428 Cr.P.C. was also granted to the appelllant. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. This Court heard the learned counsel for the appellant Sri. B.Raman Pillai and learned Public Prosecutor Sri.Puzhakkara Muhammed.

3. Learned counsel for the appellant has raised the following contentions to challenge the impugned judgment:- Firstly, it is contended that the trial court had committed serious error in believing the evidence of PWs.35 and 36 to find the appellant guilty under section 57-A of the Abkari Act. Secondly, it is contended that the trial court has committed serious error in placing reliance on the evidence of PW35 C.I. of Police and Exts.P47 and P48 to find the appellant guilty under section 57-A of the Abkari Act. Thirdly, it is contended that the trial court has committed serious error in finding that the appellant was the contractor of toddy shops

in question and possess adulterated toddy only on the basis of Exts.P55 and P56. Fourthly, it is contended that as the relationship between the appellant and accused Nos.2 and 3 has not been proved, the appellant was not responsible for sale of the adulterated toddy. Lastly, it is contended that the presence of diazepam in the sample has not been legally proved.

4. Question to be considered in the appeal is whether the finding of the trail court that the appellant has committed an offence punishable under section 57-A(3) of the Abkari Act is sustainable or not?

5. Before considering the contentions raised by the learned counsel for the appellant it is proper for this Court to consider the prosecution case as such against the appellant and accused Nos.2 and 3. On 17-4-1996 due to the consumption of adulterated toddy from T.S.Nos.169 and 180 at Kondazhi and Vadakkethara respectively PWs.1, 3 to 23 were admitted for treatment in the Government Hospital, Chelakkara and on the basis of Ext.P1 F.I. Statement alleged to have been given by PW1 Crime No.64/96 of Pazhayannur Police Station was registered. PW35 C.I. of Police, Chelakkara took up the investigation on 18-4-1996 and on the same day he inspected T.S.No.180 housed in building No.1/71 of Pazhayannoor Panchayat which belongs to Karthiyayani. He found toddy in a mud pot having capacity of 18 litres. After preparing Ext.P48 mahazar in the presence of witnesses, mud pot was taken into custody. PW35 also

inspected T.S.No.169 at Kondazhi housed in building No.VII/38 of Kondazhi Panchayat which belongs to one Sankaranarayanan and found 2 litres of toddy kept for sale in a mud pot. The 3rd accused was also present in the shop at the time of inspection. He after preparing Ext.P47 mahazar in the presence of witnesses seized the mud pot and collected samples. Thereafter on 19-4-1996 PW35 arrested the appellant and accused 2 and 3 and produced before the court. PWs.1, 3 to 23 were referred to Medical College Hospital, Thrissur and they were admitted in the Medical college Hospital and treated by PW27, Lecturer in Medicine at Medical College, Thrissur. He issued Ext.P33 to 46 medical certificates. PW24 Civil Surgeon attached to the Government Hospital, Chelakkara had examined PWs.1, 3 to 23 and issued Exts.P24 to 30 medical certificates. PW36 continued the investigation and filed final charge against the appellant and accused 2 and 3.

6. The prosecution has tried to establish that PWs.1, 3 to 23 had consumed adulterated toddy mixed with diazepam and they were admitted in the Government Hospital, Chelakkara for treatment. They denied having consumed toddy from the toddy shops in question and hence they were declared hostile to the prosecution. PW1 who alleged to have given Ext.P1 statement denied his signature in Ext.P1 statement. In cross-examination PWs.1, 3 to 23 admitted that they had not consumed toddy from the toddy

shops in question on the relevant date. The trial court after considering the entire evidence found that there is no evidence to hold that PWs.1, 3 to 23 had consumed toddy from the shops in question on 17-4-1996 and consequent to that they had to undergo treatment either at the Government Hospital, Chelakkara or at the Medical College Hospital, Thrissur. However, the trial court after considering the evidence found that the appellant was found in possession of toddy containing noxious substance which is likely endanger human life or cause grievous hurt to human being and hence he was found guilty under section 57-A(3) of the Abkari Act.

7. A question to be considered is whether the recovery alleged to have been made by PW35 as per Exts.P47, P48 and P51 from the toddy shops in question can be relied on without any corroboration of any independent witness?

8. The trial court accepted the evidence of PW35 that he had seized the material objects Mos.1 to 6 as per Exts.P47, P48 and P51 from the toddy shops mentioned therein. PWs.29 and 30 were the attester's in Exts.P47 and 48. They denied having witnessed the seizure and they had not supported the prosecution case. A reading of Exts.P47 and P48 would show that T.S.Nos.169 and 180 were functioning in building No.VA//38 of Kondazhi Panchayat and 1/71 of Pazhayannur Panchayat belong to one Sankaranarayanan and one Karthiyayani respectively and none of these

persons was questioned or examined by the prosecution. Ext.P47 and P48 would not show that the search was conducted in the presence of any independent witness. In this context, it has to be noted that though PW35 stated before the court that he had prepared search list and copy of the same was given to the court. Exts.P47 and P48 would not show that copy of such search list has been given either to the owners of the building or even to accused Nos.2 and 3 who were present at the time of search and preparation of Exts.P47 and P48. Though PW33 was examined to prove that he was present at the time of search, but he stated that he had not seen any search made by PW35 and he was declared hostile to the prosecution. He even denied his signature in Ext.P51 search list. PW35 stated before the court that both accused 2 and 3 were present at the time of preparation of Exts.P47 and P48 mahazars. Both P47 and P48 are silent regarding the presence of accused Nos.2 and 3. Hence, evidence of PW35 and Exts.P47 and P48 are not sufficient to hold that PW35 had recovered adulterated toddy from the toddy shops in question.

9. The next question to be considered is whether the trial court is justified in holding that the appellant is the licensee or the contractor of the toddy shops in question and was responsible for keeping adulterated toddy in the shops. Regarding the seizure, the trial court has mainly relied on the evidence of PW35 who prepared Exts.P47 and P48 mahazars. He stated

before the court that when he prepared Exts.P47 and P48, he noted the sign board of the toddy shops which bore the name of the appellant. In cross-examination he stated that he had not seen any records relating to the licence of the shops in question. At the same time he stated that he had ascertained from the office of the Asst. Excise Commissioner that the licence of the shops in question was in the name of the appellant. But he could not adduce any evidence to prove the above fact. The explanation given by PWs.35 and 36 was that all the records relating to the licence in the office of the Asst. Excise Commissioner was taken for civil cases. The trial court found that as per Ext.P55 certified copy of the judgment in W.P. (C) No.8420/96 and Ext.P56 certified copy of the judgment in W.A.No.1246/96, the licence of the shops in question stood in the name of the appellant. It is not proper to rely such documents as PW35 admitted that there were actual records with the Assistant Commissioner. The prosecution should prove by adducing positive and primary evidence that the shops were in the name of the appellant. As per the evidence given by PW35, at the time of preparation of Exts.P47 and P48 mahazars accused 2 and 3 were present in the shops. But accused 2 and 3 were not found guilty of any offence as the prosecution failed to prove that they were the employees of the appellant. If that be so, the prosecution should prove that the licence of the shop stood in the name of the appellant and he was found in possession

of the adulterated toddy. If the prosecution failed to prove the relationship between accused 2 and 3 and the appellant, it is not possible to conclude that the appellant is responsible for keeping in possession of the adulterated toddy in the shops in question. In this context a decision of this Court reported in Muraleedharan V. S.I. of Police (2007(1) ILR Ker.27) is relevant. In the above decision while considering vicarious liability of a licensee under section 64 of the Act, it is held that "it was the duty of the prosecution to prove that the alleged offence was committed by the employee and only then can the employer be roped in under the above provision". By applying the above provision employer can be proceeded against only if prosecution succeeds in proving that the offence was committed by the employee.

10. The possession contemplates under section 57(a) of the Abkari Act is physical and conscious possession. The evidence in this case would not show that the appellant was actually conducting the business in the shop through accused 2 and 3. Hence, the conclusion arrived at by the trial court that the appellant is responsible for keeping or in possession of adulterated toddy in the toddy shops in question is not sustainable.

11. The prosecution case is that the sample of toddy collected from the shops belonging to the appellant contained diazepam. Evidence of DW1 Expert would show that the test conducted by PW34 did not conclusively

prove that the sample contained diazepam. In this context, it can be seen that as per the evidence of PW34, he had not conducted the required tests for diazepam.

12. In the light of the discussions and the conclusions arrived at by this Court in this judgment, this Court is of the view that the conviction and sentence ordered against the appellant are not legally sustainable and hence they are liable to be set aside. Accordingly, the conviction and sentence ordered against the appellant are set aside and the appellant is acquitted. The bail bond executed by the appellant shall stand cancelled. It is made clear that if any amount has been deposited by the appellant towards fine that shall be refunded to him as per law.

The appeal is allowed as above.

K. Thankappan,
Judge.

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K. Thankappan,J.

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Crl.A. No. 559 of 2000

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Judgment

28-9-2007